



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

AUG 20 1991

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Suing Owners in Asbestos Demolition and Renovation Cases

FROM: Michael S. Alushin *M. S. Alushin*
Enforcement Counsel for Air

TO: Regional Counsel
Regions I-X

This is a request for your assistance in achieving consistency in the treatment of owners of asbestos NESHAP demolition and renovation sites. Your cooperation in this effort will help to ensure that referrals are filed in court in a timely manner.

On June 3, 1991, this office received a letter concerning asbestos NESHAP demolition and renovation cases from John C. Cruden, Chief of the Environmental Enforcement Section at the Department of Justice (DOJ). The letter raised the question of whether EPA has been consistent in determining whether to sue owners in those cases. DOJ provided several examples of referrals in the letter to illustrate this issue.

EPA's policy is to sue both the owner of the site or facility and the party performing the demolition or renovation, unless there is a good reason not to do so. This policy is contained in the memorandum entitled Injunctive Relief in Asbestos Demolition and Renovation Cases, 1 Clean Air Act Compliance/Enforcement Policy Compendium, § D.6. (July 10, 1985), and in Policy on Suing Municipal Owners in Asbestos Demolition/Renovation Cases, Letter from Michael S. Alushin to David T. Buente (April 30, 1990). The rationale for including the owner, whether a private party or a municipality, is to ensure that qualified contractors are hired to perform these operations, and that owners exercise adequate oversight of the contractor's work. Examples of circumstances in which it may be appropriate to exclude the owner from the case are discussed in our response to the DOJ letter (attached).

To ensure national consistency and to thereby expedite the processing of our referrals, I am asking that you include a separate section in your referral packages that justifies any

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WASHINGTON, D.C. 20460

JUL 10 1985

MEMORANDUM

SUBJECT: Injunctive Relief in Asbestos Demolition and Renovation Cases

FROM: Michael S. Alushin *M. S. Alushin*
Associate Enforcement Counsel
Air Enforcement Division

Edward E. Reich, Director *E. E. Reich*
Stationary Source Compliance Division

TO: Addressees

This memorandum sets forth a policy regarding injunctions to enforce the National Emission Standard for Asbestos against demolition and renovation sources. This policy will apply to all pending and future civil actions for violations of these regulations.

The asbestos standards, 40 C.F.R. 561.140 et seq., apply to both the party performing a demolition or renovation (usually a contractor) and the owner of the subject facility. See the preamble to the repromulgation of the regulations, 49 Fed. Reg. 13658, 13659 (April 5, 1984). The asbestos strategy document issued on April 6, 1984 sets forth guidance for determining when to include the facility owner as a defendant in a civil action to enforce these standards. Facility owners should generally be included as members of the regulated community to ensure that they hire qualified contractors to remove asbestos properly. Only where the owner has acted responsibly, for example, by hiring a reputable contractor and attempting to monitor or supervise the contractor's performance, should the Agency exercise discretion not to sue the owner.

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In almost all civil actions to enforce asbestos regulations against demolition and renovation sources, the action is filed after the violations have occurred.* Injunctions are therefore directed at future demolition and renovation activity. Injunctive relief should be sought against contractors, since they are likely to be handling asbestos again in the ordinary course of business. An injunction against future violations in a court order or consent decree vests the court with continuing jurisdiction until the termination date of the decree to enforce the NESHAP requirements. The prospect of a contempt action for future violations may serve as a more effective deterrent than would otherwise exist.

Facility owners are situated differently, since they are not ordinarily in the business of asbestos removal. In determining whether to seek an injunction, the Agency should consider the potential for future violations during the life of the decree. Injunctions should be sought against facility owners if the demolition or renovation which was the subject of the lawsuit is part of an ongoing series of demolition or renovation projects, e.g., a program of asbestos removal from buildings within a school district, or if the facility owner plans further projects involving friable asbestos. If these factors are not present, an injunction is not necessary.

Injunctive relief need not be limited to merely a command to comply with the regulations. Equitable relief should be fashioned to try to prevent, at a minimum, recurrence of the violations alleged in the complaint. If, for example, a defendant gave incomplete notification of a demolition project, the Agency could seek to enjoin that party to use a specific form in submitting asbestos notifications. If the facility owner hired as the lowest bidder a contractor unqualified to do asbestos work, we may wish to enjoin the owner to address NESHAP compliance in all bid specifications for jobs involving asbestos removal. It is not possible to provide comprehensive guidance on the form of injunctive relief to be sought in all cases, but the specifics of an injunction can be worked out among the litigation team as the case develops.

Questions regarding this policy should be directed to Elliott Gilberg of the Air Enforcement Division at FTS 382-2864.*

*If a civil action is filed for an ongoing violation, injunctive relief should be sought against all defendants, to afford the greatest chance of effectuating immediate compliance.

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Addressees:

**Regional Counsels
Regions I-X**

**Air Management Division Directors
Regions I, III, V, and IX**

**Air and Waste Management Division Directors
Regions II and VI**

**Air and Toxics Division Directors
Regions VII, VIII, and X**

**Air, Pesticides, and Toxics Management Division Director
Region IV**

**Regional Enforcement Contacts
Regions I-X**

**cc: David Buente, Acting Chief
Environmental Enforcement Section
Department of Justice**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 30 1990

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Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
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Washington, D.C. 20044

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

Re: Policy on Suing Municipal Owners in Asbestos
Demolition/Renovation Cases

Dear Mr. Buente:

Thank you for your letter of February 21, 1990 regarding EPA's policy on suing municipal owners in asbestos NESHAAP cases. I appreciate the effort your Department has devoted to asbestos enforcement and hope this letter will help to clarify EPA current policy in this area.

The preamble to the April 5, 1984 repromulgation of the asbestos NESHAAP expressed the Agency's legal interpretation that the asbestos regulations apply to the owners of demolition and renovation sites. Contemporaneous with that repromulgation, EPA issued an Asbestos Strategy on April 6, 1984. That strategy said, on page 15:

"The asbestos regulations apply to each 'owner or operator' of a demolition or renovation operation. EPA has construed this language to include both the owner of the site and the party performing the demolition or renovation, usually a contractor. This position is reiterated in the preamble to the repromulgation of the standard...As a general rule, the Region should also proceed against the site owner. However, the Region may exercise discretion where an owner can show that the contract or bid specifications required that the demolition contractor comply with the asbestos regulations."

Our July 10, 1985 policy, which we previously sent you, referenced the April 6, 1984 Asbestos Strategy Document. The July 10, 1985 document said:

"Facility owners should generally be included as members of the regulated community to ensure that they hire qualified contractors to remove asbestos properly. Only where the owner has acted responsibly, for

example, by hiring a reputable contractor and attempting to monitor or supervise the contractor's performance, should the Agency exercise discretion not to sue the owner."

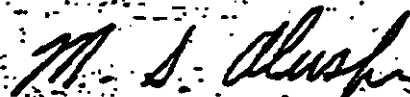
Neither the April 1984 strategy nor the July 1985 policy distinguished between municipal and other defendants. Although your February 21, 1990 letter suggests that the EPA policies apply only to actions seeking injunctive relief, as we indicated in the April 1984 strategy, we intended our policy to apply to claims for injunctive relief and penalties.

We have been pursuing owners for years. You mentioned that we had not always sued owners, especially where it concerns local government entities. As our analysis of the past two years of asbestos referrals indicates, we always sue owners, even local governments, unless there is a good reason not to do so. I am not aware of any case in which the omission of owners was unjustified. If you are aware of any examples, please let me know. We do not distinguish municipal owners from private owners when deciding whether to refer an owner as a potential defendant.

In conclusion, we should always sue owners for penalties as well as injunctive relief, even if those owners are municipalities or other local government entities, unless there is a substantial reason to exercise our enforcement discretion. As previously mentioned, some of those reasons are if the owner is a federal entity, if the owner has been very cooperative with our investigation, perhaps even reporting violations by the contractor, or if the case involves one operator with violations at so many different facilities that adding all the different owners would unnecessarily complicate the case.

Please contact me at 382-2820 or Charles Garlow at 475-7088 if you wish to further discuss this issue.

Sincerely,



Michael S. Alushin
Associate Enforcement Counsel
for Air

cc: John Seitz
Robert Van Heuvelen
EES Assistant Chiefs
Joseph Block
Bert Frey
David Kee